

R10 Hydroelectric NPDES permits and CWA Section 316(b)

Issue

Region 10 is in the process of issuing permits for hydroelectric facilities that incorporate CWA Section 316(b) requirements. Most of these permits are moving towards public notice in the next month.

Ex. 5 Deliberative Process (DP)

Permits

Region 10 has received applications for NPDES permit coverage from four smaller non-federal hydroelectric generating facilities in Idaho. In addition, pursuant to two settlement agreements entered into by the USACE and the USBRec with an environmental group, Columbia Riverkeeper, applications were submitted for 9 federal dams along the Lower Snake and Lower Columbia Rivers. USBRec owns/operates the Grand Coulee Dam on the Columbia River. The applications that were submitted were for incidental discharges from the dams. These will be the first NPDES permits for these facilities and thus the permits are subject to the initiative to clear all outstanding new permit applications by the end of the calendar year.

R10 prepared and public noticed a general permit for hydroelectric facilities in Idaho in April 2018. R10 received comments from UWAG/National Hydroelectric Association, USACE, USBRec, Idaho, and Idaho Power. UWAG/NHA provided comments that question the applicability of 316(b) to hydroelectric facilities. Region 10 and OWM are working on responding to the comments.

Ex. 5 Deliberative Process (DP)

Section 316(b)

CWA Section 316(b) provides that:

Any standard established pursuant to section 301 or section 306 of this Act and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact. (33 U.S.C. 1326)

EPA developed specific regulations that require NPDES permits that implement those standards to evaluate the cooling water intake structures and include a Best Technology Available determination per the specific rule or under best professional judgment (BPJ).

The applicability of the specific 316(b) rules vs BPJ is governed by two main criteria: 1) whether the design capacity of the intake is over 2 MGD and 2) whether more than 25% of the volume withdrawn is used exclusively for cooling. Most hydroelectric facilities will fall below this threshold and have 316(b) applied on a BPJ basis.

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This imposes additional application requirements on the facility and specific impingement and entrainment standards based upon the technologies evaluated during the rulemakings.

Hydroelectric Facilities

NPDES coverage of hydroelectric dams was addressed in *National Wildlife Foundation v Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) and *National Wildlife Foundation v Consumers Power* 862 F.2d 580 (6th Cir. 1988) among other cases. These cases clarified that the hydroelectric generation water that flows through the turbines is not subject to the NPDES program. However, the *Consumers Power* case specifically identified that there is a reasonable distinction “between those pollutants already in the water moved and transformed by the essential operation of a hydroelectric power dam and those waste products "added" to the water by tangential processes in generating electricity.” The court identified noncontact cooling water and the addition of heat as an operational wastewater appropriately addressed by the NPDES program.

An important point is that the cooling water intake is typically located where it will withdraw from the hydroelectric generation water. The cooling water intakes are often located in the penstocks or the scroll case for the turbine, both inside the dam structure. The hydroelectric generation water flowing through the dam remains a water of the US as discussed in the *Gorsuch* and *Consumers Power* cases.